IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.560 OF 2005

Bombay Dyeing Mfg.Co.Ltd. ..Petitioner.

V/s.

Roofit Industries Ltd. & Ors. ..Respondents.

Mr.Mahesh Jethmalani for S.N.Raj for petitioner.

Mr.Dilip Devadiya i/b Mahesh Kotian for respondent No.1 to 4.

Mr.Rajesh More, APP for State.

CORAM: A.M.KHANWILKAR,J

DATE : DECEMBER 14, 2005.

P.C. :

1. Heard counsel for the parties.

2. Rule. Rule made returnable forthwith by consent. Mr.Devadiya waives notice for respondent no.1 to 4 and Mr.More, APP waives notice for respondent No.5.

3. As short question is involved, petition is taken up for final hearing forthwith by consent.

4. Petitioner instituted criminal action against the respondent No.1 to 4 for offence punishable under section 138 r/w 142 of the Negotiable Instruments Act

in the court of Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai being Case No.1367/S/2002. Process was issued and the petitioner complainant was expected to pay process fee in terms of order dated 21st June, 2002. No process fee was paid for and on behalf of the petitioner till 10th July, 2003 when the matter was listed before the court for which reason, the court proceeded to dismiss the complaint for want of prosecution.

5. Against that order petitioner carried the matter in revision before the Sessions Judge, Greater Bombay being Criminal Revision Application No.83 of 2004. The petitioner offered explanation in the Revision interalia that due to mistake of the advocate, process fee could not be deposited in court in time. The reason being that the lady advocate who was dealing with the case in the office proceeded on maternity leave. She left the chamber of senior advocate without giving details of steps to be taken in the present case, on account of which due to inadvertence, the matter remained unattended. The revisional court however, has observed that it is not in dispute that there are large number of advocates associated in the chamber of Senior advocate and for which reason justification offered was unacceptable.

This is the subject matter of challenge in the present petition.

6. Counsel for the respondents No.1 to 4 raised preliminary objection about the maintainability of the present petition. I shall first deal with the said contention of the respondents straightway. Reliance was rightly placed by the petitioner on the decision of the Division Bench of Calcutta High Court reported in **AIR (31) 1944 Calcutta 417** in the case of **Bireswar Banerji V/s.Emperor.** Court has observed that where the process fee for the summons has not been filed by the complainant and no summons is issued to the accused the proper procedure for the Court is to dismiss the complaint. The consequence of such dismissal does not entail in acquittal of the accused. In view of the exposition in this Judgment, preliminary objection will have to be negatived.

7. In so far as merit is concerned, as mentioned earlier, the revisional court declined to accept the explanation offered on behalf of the petitioner about lapse on account of mistake of the advocate. Merely because the senior advocates through whose chamber, the matter was prosecuted by the petitioner has large number of associates, does not mean that the lapse

has been committed intentionally or with purpose. On the other hand, there is no reason to discard the explanation offered on behalf of the petitioner that the lady advocate who was dealing with the matter left the office, on account of which the matter remained unattended due to inadvertence. In any case, for the mistake of advocate, it is well settled, litigant should not suffer. Accordingly, in the interest of justice, in my view, this petition would succeed.

8. As a consequence, the order passed by the revisional court which in turn confirmed the order passed by the Magistrate, both the orders are set aside and instead, the complaint is restored to file to its original number to be proceeded with by the trial court on its own merit in accordance with the law. Parties to appear before the trial court on 23rd January, 2006 at 11.00 a.m. so as to facilitate the trial court to fix the matter for hearing as may be convenient.

9. Rule made absolute on the above terms.